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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

Public Document

Prosecution's Response to the Government of Kenya's Application for Leave to Appeal the "Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence"

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Introduction

1. On 29 June 2011 the Pre-Trial Chamber issued its “Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence”. The Chamber rejected the request on the basis that there is not evidence that “there is or has been an ongoing investigation with respect to either ‘conduct’ constituting a crime set out in article 5 of the Statute, or in relation to a ‘serious crime under the national law of the requesting State’” (“Decision”).¹

2. The Government of Kenya is seeking leave to appeal the Decision, alleging that it contains the following three errors:²
 - an error of fact in holding that the Cooperation Request “*lacked any documentary proof that there is or has been an investigation*” (“First Issue”);
 - an error of procedure by not allowing the Government of Kenya to reply to the Prosecutor’s Response to the Government of Kenya’s Cooperation Request of 10 May 2011 (“Second Issue”); and
 - an error of law in holding that the Chamber could not order the Prosecutor to provide any material or evidence in his possession to a State pursuant to a request under Article 93(10) (“Third Issue”).

3. The Prosecution submits that these three Issues do not meet the criteria for leave to appeal pursuant to Article 82(1)(d) and that the Government of Kenya’s application should therefore be rejected.

¹ ICC-01/09-63, para. 34.

² ICC-01/09-71.

Background

4. On 31 March 2011, the Government of Kenya (“GoK”) filed its challenge to the admissibility of the case against William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang (“Admissibility Challenge”).³
5. On 21 April 2011, the GoK filed a request for cooperation and assistance under article 93(10) and Rule 194 (“Cooperation Request”),⁴ seeking the Court’s assistance in the form of receiving “all statements, documents, or other types of evidence” obtained in the course of the Prosecutor’s investigations.⁵ According to the GoK, this would assist the national authorities in conducting and advancing their investigations and prosecutions into the Post-Election Violence.⁶ Therefore, the GoK requested the Pre-Trial Chamber to address the matter prior to ruling in the merits of the Admissibility Challenge.
6. On 10 May 2011, the Prosecution filed its observations on the Cooperation Request (“Prosecution’s Observations”).⁷
7. On 18 May 2011, the GoK requested leave to reply to the Prosecution’s Observations (“Request for Leave to Reply”).⁸ It requested, *inter alia*, that the Chamber “consider [its] Reply, once filed, before any final determination of the Admissibility Application is made and to render a decision on the [Cooperation Request] before a final determination is made on the Admissibility [Challenge]”.⁹
8. On 30 May 2011, the Pre-Trial Chamber issued the decision on the Admissibility Challenge (“Admissibility Decision”),¹⁰ concluding that two cases arising out of the investigation into the situation in Kenya are admissible. As a preliminary

³ ICC-01/09-01/11-19.

⁴ ICC-01/09-01/11-58.

⁵ Cooperation Request, p.3.

⁶ Cooperation Request, p.3.

⁷ ICC-01/09-01/11-83-Corr and its annex; ICC-01/09-02/11-86-Corr and its annex.

⁸ ICC-01/09-61.

⁹ Request for Leave to Reply, para.13.

¹⁰ ICC-01/09-01/11-101.

matter, the Pre-Trial Chamber found that the Cooperation Request was unrelated to the Admissibility Challenge and concluded that it should “rule on the merits of the Cooperation Request in a separate decision to be issued subsequently”.¹¹

9. On 31 May 2011, the GoK requested the Chamber to rule on the Request for Leave to Reply before the Chamber ruled on the Cooperation Request.¹²
10. On 6 June 2011, the GoK filed an appeal against the Admissibility.¹³ On 20 June 2011, the GoK filed its Document in Support of the Appeal,¹⁴ arguing, *inter alia*, that the Chamber erred when it refused to decide on the Cooperation Request prior to ruling on the merits of the Application by holding that there was no link between the Cooperation Request and the Application.¹⁵
11. On 29 June 2011, the Chamber issued its “Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence” (“Decision”).¹⁶
12. On 4 July 2001, the GoK filed an appeal against the Decision pursuant to Article 82(1)(a).¹⁷ On the same day, the GoK also filed an application for leave to appeal the Decision (“Application”).¹⁸ In this latter document, it informed the Pre-Trial Chamber that its “primary submission is that no leave is required to have its appeal heard by the Appeals Chamber” and that the Application is filed “in the event that the Appeals Chamber does not accept this submission”.¹⁹

¹¹ Decision, paras.32-35.

¹² ICC-01/09-62.

¹³ ICC-01/09-01/11-109.

¹⁴ ICC-01/09-01/11-135.

¹⁵ ICC-01/09-01/11-135, para.73.

¹⁶ ICC-01/09-63.

¹⁷ ICC-01/09-70.

¹⁸ ICC-01/09-01/11-110.

¹⁹ Application, para.4.

The Prosecution's submissions

13. The Prosecution submits that the three Issues fail to meet the requirements for leave to appeal pursuant to Article 82(1)(d). Consequently, the Prosecution requests that the Application be rejected.
14. In a separate submission to the Appeal Chamber, the Prosecution will submit that the appeal against the Decision brought pursuant to Article 82(1)(a) should also be rejected. Since the present Application is filed in the alternative to that Appeal, the Chamber may consider deferring a decision on the Application until the Appeals Chamber has ruled on the receivability and/or the merits of the separate Article 82(1)(a) appeal brought against the Decision.

(i) The First Issue does not meet the criteria for leave to appeal

15. The GoK argues that the Chamber erred in fact in holding that the GoK failed to satisfy the requirement of Article 93(1)(a) because the “two-page Cooperation Request [...] lacked any documentary proof that there is or has been an investigation”.²⁰ It submits that it had informed the Court that it was conducting an investigation at all levels in respect of all persons against whom there may be allegations of participation in Post-Election Violence.²¹ In order to support its argument, the GoK refers to its challenge of the admissibility of the case filed on 31 March 2011 and related annexes submitted on 20 April 2011,²² as well as to its reply filed on those proceedings and the related annexes.²³ The Appellant argues

²⁰ Application, para.6, referring to Decision, para.34.

²¹ Application, para.7.

²² See Application, fn.7, referring to Cooperation Request, para 3. In footnote 1 of the Cooperation Request, reference is made to the admissibility challenge of 31 March 2011 (ICC-01/09-01/11-19) and the related annexes filed on 20 April 2011 ((ICC-01/09-01/11-64).

²³ Application, para.8, referring to the reply filed on 13 May 2011 (ICC-01/09-01/11-89 and its annexes).

that it is overly technical to reject the Cooperation Request on the basis that the evidence must be appended to the Cooperation Request.²⁴

16. The Prosecution submits that even if, *arguendo*, the Chamber should have considered the information provided by the GoK in support of its admissibility challenge to decide on the Cooperation Request, this does not render the First Issue an appealable one. First, the Chamber has already determined in its decision on the GoK's admissibility challenge that "the factual information available to the Chamber and the arguments set forth, demonstrate that there are no concrete steps showing ongoing investigations against the [ICC] suspects".²⁵ Hence, in the absence of additional information to support its Cooperation Request, the GoK cannot claim any unfairness simply because the Chamber stands by its decision that there is no evidence concerning ongoing investigations in Kenya.

17. Second, and more importantly, the matter that lies at the heart of the First Issue (i.e. the correctness of the Chamber's factual finding with respect to ongoing national investigations) is already before the Appeals Chamber. In its appeal pursuant to Article 82(1)(a) against the Chamber's decision on the GoK's admissibility challenge, the GoK raised an error of fact in the Chamber's conclusion that no investigations were undertaken into the six ICC suspects.²⁶ Hence, to refer this same matter to the Appeals Chamber once again would only duplicate appellate litigation on the same issue, which means that an appeal on the First Issue would not "materially advance the proceedings" within the terms of Article 82(1)(d).

²⁴ Application, para.9.

²⁵ ICC-01/09-01/11-101, para.60 ; see also para.70.

²⁶ ICC-01/09-01/11-135, paras 3-11 and 42-58.

(ii) *The Second Issue does not meet the criteria for leave to appeal*

18. The GoK argues that the Pre-Trial Chamber committed a procedural error in refusing the GoK an opportunity to reply to the Prosecution's Observations on the Cooperation Request. Most of the arguments advanced by the GoK in relation to its Second Issue pertain to the merits of the matter,²⁷ which are irrelevant to determine the appealability of an issue.²⁸
19. The Prosecution submits that regardless of whether the GoK's requests for leave to reply are considered as a sequence of two separate requests, as the Chamber did,²⁹ or whether they are to be interpreted as a single request, as proposed by the GoK,³⁰ the Second Issue does not meet the criteria for leave to appeal. The GoK asserts that the Second Issue affects the fair and expeditious conduct of the proceedings as the Chamber's alleged errors "denied the Government of Kenya the opportunity to reply to the arguments that were relied on to reject the Cooperation Request".³¹ However, the GoK's general assertion is unsubstantiated and speculative. In particular, although the GoK made it clear that it disagrees with the Chamber's decision, it does not specify how the Chamber's discretionary decision denying the GoK an opportunity to file a reply affects the fair and expeditious conduct of the proceedings. In order to be granted leave to appeal, the GoK bears the burden to demonstrate that the impact of an issue on the proceedings is not merely hypothetical.³² In this case the GoK has failed to do so.
20. Similarly, the GoK submits that "an immediate resolution by the Appeals Chamber [of the Second Issue] could materially advance the proceedings in that it would permit the Appeals Chamber to consider the Cooperation Request in light of the [GoK's] full submissions and to decide [...] whether the Request should be

²⁷ See Decision, paras.12-15.

²⁸ ICC-02/04-01/05-20-US-Exp, para. 22.

²⁹ Decision, para.18.

³⁰ Application, para.12.

³¹ Application, para.16.

³² ICC-01/04-01/07-1958, para. 20.

granted.”³³ This assertion is equally speculative and unsubstantiated. The GoK does not demonstrate how referring the Second Issue to the Appeals Chamber is required to “provide[...]a safety net for the integrity of proceedings,”³⁴ or why the Decision, “unless remedied on appeal, will entail a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.”³⁵ The GoK merely asserts that its proposed procedure “would ensure that the Cooperation Request was determined in the course of deciding the admissibility challenge.”³⁶ However, this argument falls short to make the case for the GoK and is inconsistent with the GoK’s assertion in the same Application that the sole purpose of the Request was to ensure that it was given a right to reply “before the merits of the Cooperation Request were decided”.³⁷

(iii) *The Third Issue does not meet the criteria for leave to appeal*

21. The GoK argues that the Chamber committed an error of law in finding that “it could not oblige the Prosecutor to disclosure evidence in his possession to a State pursuant to Article 93(10)”.³⁸ The GoK submits that “[t]his legal issue affects the fair and expeditious conduct of the proceedings in that if the Prosecutor could be directed to disclose evidence in his possession it would mean that this evidence was capable of being provided to the Government of Kenya by the Prosecutor without delay. A decision by the Appeals Chamber in favour of the Government of Kenya would ensure that the proceedings in relation to accessing this evidence were advanced while the admissibility proceedings were ongoing an error of law in holding that the Chamber could not order the Prosecutor to provide any

³³ Application, para.16.

³⁴ ICC-01/04-168, paras. 14-15, 18.

³⁵ ICC-01/04-168 OA3, para. 16.

³⁶ Application, para.16.

³⁷ Application, para.12. In this context, the Prosecution notes that the Second Cooperation Request was filed after the Chamber issued its decision on the admissibility challenge. Hence, this request could not possibly have the purpose alleged by the GoK in the Application.

³⁸ Application, para.17.

material or evidence in his possession to a State pursuant to a request under Article 93(10)".³⁹

22. The Prosecution submits that even if the GoK succeeded on appeal and as a result the Prosecution was directed to disclose evidence in its possession to the GoK, this could not have any impact on the admissibility proceedings that were triggered by the GoK.
23. First, the Appeals Chamber has determined that the lodging of an admissibility challenge crystallizes the relevant point in time for the purposes of determining whether there is a national investigation covering the same case. It ruled that "[i]f, at the time of the admissibility challenge, the State is investigating or prosecuting a case, or has investigated a case and decided not to prosecute, the case will be inadmissible before the Court, subject to the exceptions provided for in article 17 (1) (a) and (b)."⁴⁰ Therefore, any information shared by the Prosecution with the GoK as a result of an appeal against the Cooperation Decision, could at best trigger or advance future investigations, but it can under no circumstances have any retroactive impact on investigations up until the time when the admissibility challenge was filed and thereby it cannot have any impact on the fair and expeditious conduct of the pending admissibility proceedings. For the same reasons, an immediate ruling of the Appeals Chamber on this matter is also not required.
24. Second, the Prosecution recalls that in the Cooperation Request, the GoK seeks the Court's assistance in the form of receiving "all statements, documents or other types of evidence obtained by the Court and the Prosecutor in the course of the ICC investigations into the Post-Election Violence".⁴¹ Information that was obtained by the Prosecution in its own investigation is by no means proof that

³⁹ Application, para.18.

⁴⁰ ICC-01/04-01/07-1497 OA8, para. 111 (emphasis added).

⁴¹ Cooperation Request, p.3.

national authorities conducted the necessary investigative steps. They are proof that the *Prosecution* conducted such investigations. They are therefore irrelevant for the purposes of the pending admissibility proceedings.⁴²

Conclusion

25. For the reasons set out above, the Prosecution requests that the Pre-Trial Chamber reject the Application.



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Prosecutor

Dated this 8th day of July, 2011
At The Hague, The Netherlands

⁴² It is to be expected that the GoK would be in possession of all relevant information pertaining to the investigative activities of national authorities within its territory.